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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 604 MISC.

GRACE FRANK, Administratrix ad Prosequendum of the Estate of DANIEL FRANK, Deceased, PETITIONER,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinion of the United States District Court for the District of New Jersey (Pet. App. 17-23) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 23-26) is reported at 250 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1957.[1] The petition for a writ of

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[1] A copy of this judgment has not been made a part of the record filed by the petitioner in this Court. The filed record consists solely of the petitioner's appendix in the Court of Appeals, which was restricted to the opinion and supplemental opinion of the District Court's. The appendix to the petition for a writ of certiorari contains, in addition, the opinion of the Court of Appeals (Pet. App. 23-26).

certiorari was filed on March 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the liability of the United States, under the Tort Claims Act or the Public Vessels Act, for alleged negligence in the conduct of a Coast Guard rescue operation is greater than the liability of a private salvor in like circumstances.

2. Whether a private salvor would be liable for negligence resulting in inability to rescue a drowning man, where the drowning man's peril was not brought about or increased by the salvor.

STATUTES INVOLVED

(*1*). The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b):

> * * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the

same manner and to the same extent as a private individual under like circumstances * * *.

* * * * *

28 U.S.C. 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

* * * * *

(2). Section 1 of the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, provides as follows:

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

(3). The Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742, 743, provides in pertinent part:

Section 2:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be

maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *. * * *

Section 3:

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *

STATEMENT

Petitioner, as administratrix of the estate of her son, Daniel Frank, brought this action to recover damages from the United States for his allegedly wrongful death. The complaint asserted a cause of action under both the Federal Tort Claims Act and the Public Vessels Act, *supra*, pp. 2-3, as supplemented by the New Jersey Wrongful Death Act, N.J.S.A., Section 2A:31-1 (Pet. App. 23). Both courts below held that petitioner's evidence did not establish liability on the part of the United States. The pertinent facts may be summarized as follows:

On June 7, 1952, Frank was a passenger aboard the thirty-foot cabin cruiser Orion. At approximately 2:30 p.m., having become disabled due to engine failure, the Orion was forced to anchor at a point less than 400 yards off Sandy Hook, New Jersey. While the weather was clear, 25-mile-per-hour winds, accompanied by a strong tidal rip, produced breaking waves 4 feet or more in height. The Coast Guard Lifeboat Station at Sandy Hook was flying small-craft warnings and, by that time, had sent to the assistance of other craft in that area all but one of its boats suitable for towing. Upon being apprised that the Orion was in distress, the

Coast Guard sent the remaining boat, a heavy motor lifeboat, to render assistance. (Pet. App. 17, 23-24.)

When the lifeboat arrived alongside of the Orion, Frank was on the forward deck of the cruiser. In spite of the roughness of the water, he had not donned one of the life preservers which were on board. (Pet. App. 18.)

A tow line was passed from the lifeboat and, when it had been secured to a forward deck cleat of the cruiser, the towing operation commenced. Shortly thereafter, Frank attempted to make his way aft, along the side deck of the cruiser, to the cabin, holding on to a handrail on the boat's cabin top. Before he could reach the cabin, the cruiser lurched, the handrail ripped loose and Frank fell into the water. The lifeboat crew immediately cut the towline and made every effort to rescue Frank. He drowned, however, before they could reach him. (Pet. App. 16, 24.)

In her complaint, petitioner alleged as a basis for imposing liability on the Government that (1) the lifeboat had a defective reverse gear which delayed it in reaching Frank after he had fallen overboard; (2) the life rings in the lifeboat were secured in such a fashion that they could not be immediately thrown overboard; and (3) the lifeboat crew was sub-standard (Pet. App. 24). After trial, the District Court entered a memorandum opinion in which it exonerated the United States on the authority of *P. Dougherty Co. v. United States*, 207 F. 2d 626 (C.A. 3), certiorari denied, 347 U.S. 912 (Pet. App. 17-19). In a supplemental opinion (Pet. App. 20-22), the court held that, although the lifeboat was unseaworthy and the Government was guilty of "gross negligence" in failing to repair the clutch, the petitioner had not established that this negligence was the proximate cause of Frank's drown-

ing. In this connection, the court pointed out that it was entirely conjectural whether the defective condition of the lifeboat "was a substantial factor in the end result of the attempted rescue." (Pet. App. 22.)

The Court of Appeals affirmed on a different ground. It noted that "[o]n [petitioner's] own theory the effect of the alleged faults of the Coast Guard was to prevent its own rescue party from reaching the drowning man soon enough to save him" and that "[t]here has been no showing that any fault of the Coast Guard contributed in any way to Frank's falling into the sea" or that "the Coast Guard in any way worsen[ed] his plight thereafter." (Pet. App. 24.) It then held that the responsibility of the Coast Guard with respect to the attempted rescue operations "rises no higher than that of a private salvor" (Pet. App. 25) and that the salvor is not liable for "a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel" (Pet. App. 26).

ARGUMENT

The Court of Appeals correctly held that the appropriate standard of reference is the body of principles governing the tort liability of private salvors, and that such a salvor would not be liable in the circumstances of this case. Contrary to petitioner's position, there is no conflict with decisions of this Court or of other courts of appeals. Accordingly, there is no occasion for further review.

1. The express language of both the Tort Claims Acts and the Public Vessels Act [2] discloses a clear con-

[2] The Tort Claims Act (28 U.S.C. 2680(d), *supra*) expressly excludes any claims cognizable under the Suits in Admiralty Act and the Public Vessels Act. Since the complaint is based, *inter alia*,

gressional purpose to equate (subject to certain exceptions not now relevant) the tort liability of the United States with that of a similarly situated private individual. The former provides that the United States shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674, *supra*) and "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b), *supra*). Section 3 of the Suits in Admiralty Act, *supra*, which is incorporated by reference in Section 2 of the Public Vessels Act (46 U.S.C. 782, 43 Stat. 1112), provides that "suits [against the United States] shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

As petitioner implicitly concedes, the closest private analogy to Coast Guard rescue undertakings is found in the activities of private salvors. By definition, a salvor is one who gratuitously and without prior obligation undertakes to salve property or life and property at sea. Robinson, *Admiralty* (1939), pp. 709, 720. Similarly, the Coast Guard has no legal duty to undertake any particular salvage or rescue operation, any more than it has a duty to "undertake [a] lighthouse service." Cf. *Indian Towing Co.* v. *United States*, 350 U.S.

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on the unseaworthiness of a Government vessel and the failure of Government personnel to effect a rescue at sea, it would appear to be based on a maritime cause of action falling within the exclusive waiver of immunity of the Public Vessels Act. However, as we shall see (*infra*, pp. 8-11), there could be no recovery against the United States here, regardless of which statute is applicable.

61, 69; *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.).[3] There is, of course, one distinction between the private salvor and the Coast Guard:—the latter and its personnel do not now claim, nor have they ever claimed, salvage. See *The Borgfred*, 1936 A.M.C. 804, 810 (D. V.I.); *Thornton* v. *The Livingston Roe*, 90 F. Supp. 342, 345 (S.D.N.Y.), citing *Firemen's Charitable Ass'n.* v. *Ross*, 60 Fed. 456 (C.A. 5); *Davey* v. *The Mary Frost*, 7 Fed. Cas. 14, No. 3,592 (C.C., E.D. Tex.); *The Belle*, 165 Eng. Rep. 1034; *The Aquila*, 165 Eng. Rep. 87, 90-91; see also *Murphy* v. *Ship Suliote*, 5 Fed. 99 (C.C., D. La.). But this consideration hardly affords a basis for holding the Coast Guard to a greater liability than that imposed upon the private salvor.

2. As the Court of Appeals indicated, petitioner's claim for recovery is based solely on the theory that the Coast Guard's negligence rendered its own rescue efforts ineffectual. Otherwise stated, it is plain that the Coast Guard was in no way responsible for Frank's position of peril and in no way worsened his plight.

It is quite clear that a private salvor would not be liable in these circumstances. Unless he has deterred other available rescuers, a salvor can be held liable only

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[3] Aids to navigation (such as the lighthouse involved in *Indian Towing*) are maintained by the Coast Guard under the authority of 14 U.S.C. 81, which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels * * * the Coast Guard *may* establish, maintain, and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States * * *." (Emphasis added.) The rescue service is authorized by 14 U.S.C. 88, which provides in relevant part that "[i]n order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction * * * the Coast Guard *may*: (1) perform any and all acts necessary to rescue and aid persons and protect and save property; * * *." (Emphasis added.)

for negligence which inflicts a "distinguishable" or "independent" injury on the salvaged vessel or its crew. *The S.C. Schenk*, 158 Fed. 54, 60 (C.A. 6); *The Minnie E. Kelton*, 181 Fed. 237 (D. Ore.). If the effect of the salvor's negligence is merely to defeat his own salvage attempt, leaving the vessel and its crew in no worse condition than before, there can be no liability, and at most the salvor forfeits all or a part of his salvage award.

Specifically, the salvor is not liable merely because he fails to exercise a degree of skill which he does not possess.[4] Nor is he liable for employing equipment in poor repair, when he does not have equipment in good repair at hand. See *Restatement of Torts*, § 324, p. 878. This follows from the fact that he owes no duty to those he attempts to assist to have mastered certain skills previously, or to possess or to maintain any particular type or condition of equipment. *The Allegiance*, 1 Fed. Cas. 431, No. 207 (D. Ore.); *The S. C. Schenk*, 158 Fed. 54 (C.A. 6); *Dorrington* v. *City of Detroit*, 223 Fed. 232 (C.A. 6); *The Cape Race*, 18 F. 2d 79 (C.A. 2); *The Henry Steers, Jr.*, 110 Fed. 578 (E.D.N.Y.); *The Minnie E. Kelton*, 181 Fed. 237 (D. Ore.).

In *The S.C. Schenk*, for example, a harbor tug undertook to salve a barge drifting powerless on a lee shore. The tow line slipped from the tug's tow posts and, as a result, the barge stranded. There was evidence that the line had been improperly secured on the posts by inexperienced crewmen employed by the tug's master because of a strike. The Sixth Circuit held that the tug was not liable to the barge's owner, since (1) she had

[4] The trial court expressly found that the crew of the Coast Guard vessel "exercised all of the skill and learning which they possessed to effect the rescue of * * * Frank" (Pet. App. 18).

made use of what equipment and personnel she had available and (2) no other potential salvor had been prevented from assisting the barge by the tug's intervention. It is to be noted that, since the tug was employed in general harbor work, her master and regular crew held themselves out as experts in towing and salvage operations. Yet the tug was not liable for its inexperienced crewmen in a salvage-towing operation, since she had done the best that she could with the crew available in the prevailing circumstances.

3. Petitioner's assertion (Pet. 10) that the decision below is in conflict with *United States* v. *Lawter*, 219 F. 2d 559 (C.A. 5), is without merit. As the Court of Appeals pointed out (Pet. App. 25-26), the Government was held liable in *Lawter* because the negligent performance of the rescue operation worsened the position of the decedent; indeed, that negligence had subjected the decedent to the peril which occasioned her death. Moreover, the attempted rescue by the Coast Guard had deterred other potential rescuers from offering their services. In this case, as already noted, the Coast Guard's alleged negligence played no part in placing Frank in his position of danger. To the contrary, his presence in the water was the result of either his failure to take reasonable precautions for his own safety, or of the condition of the cruiser on which he was a guest. The Coast Guard is charged solely with not having rendered timely assistance to him, once his life had thus been put in jeopardy.

Nor is there basis for petitioner's assertion (Pet. 10-11) that the decision below is inconsistent with *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215. In *Indian*

Towing, the complaint alleged that the plaintiff's barge had run aground because of its reliance on a negligently maintained, and inoperative, navigational aid. This Court held that, when the Coast Guard engenders reliance on the guidance afforded by a lighthouse, it must exercise due care to insure that injury does not flow from that reliance.[5] And in *Canadian Aviator*, a private vessel, following directly astern of a naval patrol boat under instructions from naval authorities, struck a submerged wreck. The Court held the Government liable under the Public Vessels Act on the basis of the settled principle of admiralty law that, where a tug negligently grounds its tow, the tug and its owner are liable for the resultant damages.[6] The principles discussed above, regarding the nonliability of salvors in the circumstances of the present case, are no less settled.[7]

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[5] Apart from the fact that Frank's presence in the water was in no way attributable to a reliance on the Coast Guard rescue service, the Coast Guard does not represent, expressly or impliedly, that it will at all times have experienced personnel and functioning equipment available to answer a particular distress call. Needless to say, budgetary limitations, coupled with the demands placed upon the Coast Guard during a period of adverse weather conditions, would preclude any such representation.

[6] This Court deemed the private vessel to have been in constructive tow.

[7] Even if there were circumstances in which the United States could be held liable for the allegedly negligent failure of the Coast Guard to render assistance, petitioner's position would not be improved. As the District Court correctly found (Pet. App. 22), petitioner failed to establish the necessary "causative" relation between the alleged negligence and Frank's death, *i.e.*, that the rescue operation would have been successful in the absence of that negligence. Cf. Prosser, *Torts* (2d ed.), § 41.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.